Supreme Court, U.S.
FILED

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No: _____

THE UNITED STATES SUPREME COURT

JOHN A. KEY, JR.,

Plaintiff-Appellant,

v.

WILLIAM J. HENDERSON,
POSTMASTER GENERAL
UNITED STATES POSTAL SERVICE,

Defendant-Appellee

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE FOURTH CIRCUIT

JOHN A. KEY, JR.
PLAINTIFF-APPELLANT PRO SE

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22pp

QUESTIONS PRESENTED FOR REVIEW

I. HAS A COURT OF APPEALS ENTERED A DECISION IN CONFLICT WITH ANOTHER COURT OF APPEALS ON THE SAME IMPORTANT MATTER?

II. HAS A UNITED STATES COURT OF APPEALS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT?

III. DID THE NORTH CAROLINA MIDDLE DISTRICT COURT ERR IN ANY OF THE FOLLOWING DETERMINATIONS:

(1) THAT PLAINTIFF HAD NOT PROPERLY INVOKED 28 U. C. C. SECTION 1339, AND/OR 39 U. S. C. SECTION 409(a)?

(2) THAT THE POSTAL REORGANIZATION ACT PREEMPTS JURISDICTION OVER CLAIMS WHICH FALL WITHIN THE COLLECTIVE BARGAINING AGREEMENT?

(3) THAT THE EMPLOYEE SUGGESTION PROGRAM FALLS WITHIN THE COLLECTIVE BARGAINING AGREEMENT?

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CITATIONS OF OFFICIAL REPORTS

The citations of the official reports of the opinions and orders entered in the case are as follows:

1. John A. Key, Jr. v. William J. Henderson, Postmaster General United States Postal Service, Civil No. 1:98CV00704, in the United States district court for the middle district of North Carolina.

2. John A. Key, Jr. v. William J. Henderson, Postmaster General, United States Postal Service, Record No. 99-2545, in the United States court of appeals for the fourth circuit.

STATEMENT OF THE BASIS FOR FEDERAL JURISDICTION

The judgment or order sought to be reviewed was entered on Aug. 1, 2000. The order and judgment of the middle district of North Carolina federal court was affirmed by a per curiam opinion.

An order was entered denying Appellant's motion for an extension of time within which to file Appellant's petition for rehearing in the fourth circuit court of appeals, pursuant to rule 40 of the rules of appellate procedure, and local rules 40, 40(a), 40(b) and 40(c), on or about Sept. 16, 2000.

The statutory provisions believed to confer on the United States Supreme Court jurisdiction to review on a writ of certiorari the judgment or order in question, include, but not by way of limitation, the following: 28 U. S. C. section 2101; Supreme Court Rules, Part III. Jurisdiction on writ of certiorari, rules 10 through 40; rule 21 of the rules of appellate procedure; rule 40(d) of the local rules of the fourth circuit court of appeals.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, & REGULATIONS

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CONCISE STATEMENT OF THE CASE

Facts material to a consideration of the case are as follows: Defendant-Appellee's Suggestion Program is administered by the United State Postal Service, under well defined rules and regulations set forth in its Employee Relations Manual. Plaintiff-Appellant has been an Employee for nineteen (19) years, and has submitted some fifty (50) suggestions, receiving positive results, such as cash awards and a letter of recognition, and warnings and threats, on the negative side. He became familiar with the procedures involved.

During the period of September and October 1996, Plaintiff had the idea to advertise and promote "first day cancellation" stamps by having window clerks wear neckties depicting the subject of each of these postage stamps. He first availed himself of an opportunity to discuss the idea with Enola Mixon, Postmaster of Greensboro. Ms. Mixon liked the idea and told him to submit it to the Employee Suggestion Program (ESP). From the date of submission, Dec. 8, 1996, his suggestion number 0285250 was in the possession of his Regional Facility Management in Greensboro, NC, and finally, on April 10, 1997, was turned down by Larry Bellow, Retail Specialist, apparently never being referred

up to a Postal Service vice president, as is the Postal Service's own rule for ideas with nationwide possibilities. The examining Official of Key's proposal failed to perceive his ideas met the criteria for acceptable suggestions set out in the Employee & Labor Relations Manual (ELM) 632.1, and wrongfully and mistakenly classified the proposal as unacceptable, pursuant to ELM 632.2, even though it did match the criteria set forth therein (Appendix 18). The suggestion was submitted in December 1996, and Key received a rejection letter dated April 10, 1997 (Appendix 19), even though a marketing plan combining this idea with his earlier suggestion number 160854 soon began and is making more money for the Postal Service than any other known sales endeavor not directly involved with the usual postal services. Entitled "Millions and Millions for Postal Trash," that earlier suggestion (now past statute of limitations, having been submitted Feb. 23, 1993) is significant for the specific information in its written rejection, despite later implementation, and for its efforts to discourage the initiative of the Employee, the Appellant. The rejecting Official wrote, "The U. S. Postal Service no longer produces what we refer to as license products, such as mugs, T-shirts, mats, pins, etc." (Appendix 20.) Therefore, Plaintiff-Appellant

excluded in the currently disputed idea, any suggestion that the Postal Service should make the said promotional neckties, because he had been warned against that idea by the above quoted rejection.

Just two (2) months after the Postal Service declined Key's lucrative concept, it started trying to benefit from it any way. In June 1997, Looney Tunes neckties, pins, earrings, and similar items were put on sale by the U. S. Postal Service. The Postal Service not only sold, but also manufactured said articles, or contracted their manufacture, despite the three written reasons that were presented to Key for declining his plan for boosting profits. As to the Postal Service's inclusion of "license products," Key had also earlier supplied that idea, which was formally rejected, but implemented nevertheless with great success, to the disrespect of Plaintiff-Appellant, and total neglect of any benefit to him, the valuable concept's documented originator. When the Postal Service began using Key's idea, without any credit, recognition or monetary compensation to him, it was promoted widely in the "USA" philatelic magazine. An article from the May/June 1997 issue of Postal Life," states on page 13:

"It's estimated that the Postal Service will earn $58,000,000.00 in stamps reten-

tion and philatelic products on the Bugs Bunny Stamp. Assuming the Looney Tunes series goes forward, the stamp and merchandising could net the United States Postal Service hundreds of millions of dollars in new revenue!

Yet, the concept's formal rejection states "The revenues generated from this proposal would not be sufficient to cover costs when compared to less costly forms of advertising." The other two stated reasons for decline involved comparatively trivial concerns with employee "dress code." Appellee appears willing to reap the benefits of Plaintiff-Appellant's documented profitability plan to realize the market potential for first stamp and license product sales, but unwilling to follow its own rules for the Employee Suggestion Program, as set out in the ELM, section 630 (Appendix 20). Plaintiff-Appellant had attempted to comply with Section 631.2: To improve communications between employees and management, creating a spirit of teamwork. In rejecting both above mentioned suggestions, Kelvin Mack and Larry Bellow totally ignored ELM section 631.2 on the Program's goals and objectives, in their failure to perceive Mr. Key's marketing concept did meet all the criteria for acceptable suggestions set set out in ELM 632.1.

The complaint in the instant case was dismissed by the Honorable Frank W. Bullock, Jr., Chief Judge of the North Carolina middle district federal court, citing several grounds, including a finding that Plaintiff had not properly invoked 28 U.S.C. section 1339, and that neither that statute nor 39 U.S.C. section 409(a) provided a basis of jurisdiction for the controversy between a postal employee and the Postal Service. In the case of Stephen B. Licata v. United States Postal Service, 33 F.3d 259 (1994), however, the following statement appears, at page 263 of 33 F.3d: "Two Circuits, after careful consideration, have held that where there is an independent basis for district court jurisdiction (as there is for claims against the Postal Service), both the Contract Disputes Act and the Tucker Act are irrelevant. See In Re Liberty Constr., 9 F.3d 800, 801-02 (9th cir. 1993) (contract claims against the Small Business Administration "may be entertained by the district courts, regardless of the amount sought, so long as there exists a basis for jurisdiction independent of the Tucker Act"); Marine Coatings v. United States, 932 F.2d 1370, 1377 (11th cir. 1991) (although the CDA waives sovereign immunity "there is no need to apply [the CDA] if another method of bringing suit is available"); North Side Lumber Co. v. Block, 753 F.2d 1482, 1486 (9th cir.) ("Because the proviso [added by the CDA] is an integral part of

section 1346(a)(2), we conclude that it restricts only the jurisdiction that is granted in the first part of section 1346(a)(2)."), cert. denied, 474 U.S. 931, 88 L. Ed. 2d 271, 106 S. Ct. 265 (1985); see also 2 Government Contracts, supra, section 8:226, at 153 (plaintiff may choose whether to file claim against Postal Service in district court or under the CDA). (Judge Bullock's opinion mentions the split of authority between the seventh and ninth circuits, holding that section 409(a), standing alone, does not provide an "independent basis for jurisdiction, but that the third and eighth circuits have held that "absent some other statutory bar, section 409(a) grants district courts subject matter jurisdiction over actions to which the Postal Service is a party.")

In analyzing the instant case, and attempting to determine whether there is a "substantive legal framework" present, to take the controversy out of the comprehensive scheme contained in the Postal Reorganization Act ("PRA"), 39 U. S. C. sections 1001-11, language found in the case of John Ridenour v. The United States, 44 fed.cl.202 (fed.cl.1999). At page 205 of fed.cl., and continuing at page 206, the court disposes of Defendant United States Social Security Administration's argument that, pursuant to

the case of Weber v. Department of the Army, 9F.3d.97 (fed. cir. 1993), employment suggestion programs "are personnel actions." In answering Defendant's contention that the Weber court was drawing a distinction between accepted and unaccepted employee suggestions, the Ridenour court quotes from the case of United States v. Fausto, 448 U.S. at 445 and states:

"Rather, as the quoted text of the Federal Court's decision makes clear, the distinction being drawn is between awards that commend an employee for the superiority of his job performance--and hence, are directed to his merits as an employee--and awards that compensate for suggestions the employee has no obligation to put forward in the first instance. Since the former are actions that originate with management and affect the employee in his status as a worker, they necessarily hold out a potential for supervisory abuse and therefore are included in the list of personnel actions as to which a prohibited personnel practice might occur. The later, by contrast, offer no exploitive potential because they are unrelated to the employee's status--they may affect the employee's pocketbook, but not the employee's career--and consequently are not legitimately the focus of the Civil Service Reform Act, ("CSRA").

Simply put, decisions relating to awards involving employee suggestion are not "personnel actions." Accordingly, the CSRA has no application to plaintiff's right to proceed in this court."

Given the above outlined system of analysis, the Kroll v. United States Postal Service case, 58 F. 3rd 1087 (6th cir., 1995) would have had a different result, not being deemed a "personnel matter," or subject to the comprehensive, remedial scheme contained in the Postal Reorganization Act and the instant case would have a different result.

Another argument in favor of allowing the instant case to be litigated in North Carolina middle district court can be made by the analogy of the use that is made of the Employee Suggestion Program for the implementation of ideas, with the protection afforded inventors by the patent laws, musicians by the copyright laws, and industialists by the laws governing the registration of trademarks.

In Banks v. Unisys Corporation and Burroughs Corporation, United States court of appeals for the federal circuit, No. 00-10300, decided Sept. 28, 2000, Plaintiff Banks had been recruited by a headhunter, as an expert in optical engineering, for employment with Burroughs Corporation, now wholly owned by Unisys Corporation. He was asked to sign a standard form entitled "Agreement as to Patents, Inventions and other Creative Rights, and Regarding Competitive Activities," which was essentially an agreement to assign inventive rights to Unisys. Banks did not sign the agreement. During the period of his employment, but on his own initiative, and on his own time, he tested the camera he had been employed to work with, and recommended a redesign of the camera's optics, on discovering some problems with it. As a result of his efforts, the project developed an improved design that produced an acceptable image in the camera. In 1988 Unisys incorporated the optics developed by Banks into a high speed document sorter, and asked Banks to sign as co-inventor, three of the six patent applications filed as a result of the document sorter project. On promises of pay, Banks signed the applications, but was not paid, and was

later told by Unisys he would be paid nothing. The court begain by discussing the general rule that an individual owns the patent rights to the subject matter of which he is the inventor, even though it might have been conceived, or reduced to practice, in the course of his employment. Then the two exceptions to the rule were mentioned, that if an employee has signed a contract to release his patent rights, or was hired in the first place to do research on the particular problem which resulted in knowledge that could be the subject of a patent, then the property of the invention related to that effort may belong to the employer. The court noted that Banks had refused to sign the above mentioned agreement, that Unisys did not persist in efforts to have him sign the agreement, and that on the last day of employment, he refused to sign another agreement that would have resulted in his release of any patents. The summary judgment order entered by the United States district court for the eastern district of Michigan was reversed and the case was remanded for further proceedings.

ARGUMENT

To resolve the differences among courts as to the jurisdiction of a disagreement between employer and employee concerning an Employee Suggestion Program (ESP), the above mentioned analysis used in the Ridenour case is more useful than simply taking the path of least resistance, and classifying such matter as collective bargaining disputes subject to the "PRA." Wages, working conditions, and many other aspects of employment are best addressed as collective bargaining matters. The Union is available to give the employee support, and understands the job related matters. However, a suggestion made pursuant to the ESP, is an isolated and personal matter, and an employee's rights will be detrimentally affected if he or she can only seek recourse through collective bargaining. Contract principles apply, and the injured employee should have access to the federal district courts for redress. This is especially true when the Postal Service makes no pretense of responding to a suggestion positively, then fails and refuses to follow its own rules for the Employee Suggestion Program. Mr. Key's suggestion should be viewed as intellectual property, the same as patents, copyrights, and trademarks are intellectual

property. Two months following the denial of his suggestion, Defendant-Appellee used the Employee's proposal, written "off the clock" on the employee's own personal time, without benefit to him, but for its own profit.

In Ridenour v. The United States, supra, the following statement appears on the final page of the decision:

"While the Government is free to condition the terms of its acceptance of an employee suggestion on any grounds it sees fit, it may not in turn ignore the ground rules that it has adopted. These ground rules, at least, a plaintiff may seek the enforcement of."

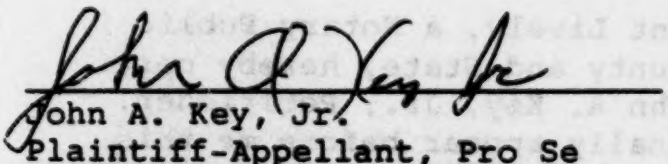
The court then quoted the following statement from Vitarelli v. Seaton, 359 U.S. 535, 546 (1959): "An executive agency must be rigorously held to the standards by which it professes to be judged."

Finally, Plaintiff-Appellant, Petitioner herein, earnestly contends that sound public policy should lead this Honorable Supreme Court to follow the reasoning of the courts of the third and eighth circuits in granting district courts subject matter jurisdiction over actions to which the Postal Service is a party, pursuant to section 409(a) of 39

U. S. C. The reasoning of the Ridenour case, although that ESP has a different statutory basis than the ESP of the Postal Service, should be persuasive. The Postal Service, probably the Nation's largest employer, should not be allowed to discriminate against its own employees in any matters involving their personal, contractual rights.

Plaintiff-Appellant requests hereby that a writ of certiorari issue, that the Supreme Court of the United States conduct such further proceedings herein as are provided for in the Supreme Court Rules and other applicable law.

Respectfully submitted,
this 1st day of January, 2001.



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THE SUPREME COURT OF THE UNITED STATES

VERIFICATION OF PETITION FOR
A WRIT OF CERTIORARI

I, the undersigned Petitioner, first being duly sworn, depose and say as follows: that I have read the foregoing Petition for A Writ of Certiorari, and the same is true of my own personal knowledge, and all parts of the Court Record and Exhibits attached hereto are accurate and complete, and accurately reflect the status of the proceedings below, this 1st day of January, 2001.

JOHN A. KEY, JR., AFFIANT,
PLAINTIFF-APPELLANT

NORTH CAROLINA - GUILFORD COUNTY

I, Kent Lively, a Notary Public of said County and State, hereby certify that John A. Key, Jr., Petitioner, did personally appear before me this 1st day of January, 2001, and executed the foregoing Verification to Petition for Writ of Certiorari, for the purposes set forth therein.

notary public
My commission expires: January 9th, 2002

Supreme Court, U.S.
FILED

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(2)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOHN A. KEY, JR.,

Plaintiff,

v.

WILLIAM J. HENDERSON, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE,

Defendant.

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APPENDIX

For the reasons set forth in the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED that Defendant's motion to dismiss (Doc. #3) is GRANTED, and this action be, and the same hereby is, DISMISSED.

/s/ "Frank W. Bullock, Jr."
United States District Judge

October 12, 1999

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOHN A. KEY, JR.,)
)
Plaintiff,)
)
v.)
)
WILLIAM J. HENDERSON, POSTMASTER)
GENERAL, UNITED STATES POSTAL)
SERVICE,)
)
Defendant.)

CIVIL NO. 1:98CV00704

MEMORANDUM OPINION

BULLOCK, District Judge

This matter is before the Court on Defendant's motion to dismiss for lack of subject matter jurisdiction and

failure to state a claim upon which relief can be granted. In this case, Plaintiff John A. Key, Jr., complains that hjis employer, Defendant United States Postal Service ("USPS"), breached a contract by failing to compensate him for the use of his suggestion in accordance with the Employee Suggestion Program. For the reasons set forth below, the court will grant Defendant's motion.

DISCUSSION

Defendant has moved to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. It is a well established principle that federal courts are courts of limited jurisdiction; "constrained to exercise only the authority conferred by Article III of the Constituion and affirmatively granted by federal statute."

In re Bulldog Trucking, Inc. v. Productive Transp. Servs.. Inc., , 147 F. 3rd 347, 352 (4th Cir. 1998). Jurisdiction is never presumed, and "thus the facts providing the court jurisdiction must be affirmatively alleged in the complaint." Pinkley, Inc. v' City of Fredrick, Maryland, 1999 WL 674746, at *5 (4th Cir. 1999). In addressing a Rule 12(b)(1) motion, the district court should grant a dismissal "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." Richmond v. Fredricksburg & Potomac R. R. Co. v. United States 945 F. 2d 765, 768 (4th Cir. 1991). In considering a motion to dismiss under Rule 12(b)(6), the court accepts as true all well pleaded allegations and views the complaint in the light most favorable to the Plaintiff. Mylan Labs, Inc. v. Matkari, 7 F. 3rd 1130, 1134 (4th Cir. 1993)

In his complaint, Plaintiff asserts that this court has subject matter jurisdiction pursuant to both 28 U. S. C. Sect. 1339 and 39 U. S. C. Sections 401 and 409. (Pl.'s Compl. Par. 1). Under 28 U. S. C. Sect. 1339 district courts "have original jurisdiction of any civil action arising under any act of congress related to the Postal Service." 39 U. S. C. Sect. 401(1) authorizes the Postal Service to "sue and be sued in its offical name." Thus, Section 401(1) functions as a "general waiver of (the) USPS's sovereign immunity." Global Mail Ltd. v. v. United States Postal Serv., 142 F. 3rd 208, 211 (4th Cir. 1998) (noting that general waivers of sovereign immunity are not necessarily total). For its part, 39 U. S. C. Sect. 409(a) provides that "district courts shall have original, but not exclusive jurisdiction over all actions brought by or against the Postal Service." Neither Section 1339 nor Section 409(a) creates a cause of action, "rather, the cause of action must be

found, express or implied, in some other statute or law." 15 James William Moore, Moore's Federal Practice, (hereinafter "Moore's"), Sections 104-45 at 104-85 3rd ed. 1997); see Unicover Corp v. United States Postal Ser., 895 F. Supp. 1437, 1442-43 (D. Wyo. 1994) (noting that these statutes "merely give this court jurisdiction over an otherwise existing cause of action").

Plaintiff invokes 28 U. S. C. Sections 1339 and 39 U.S. C. Sect. 409(a) to bring a breach of contract claim against the USPS for failing to compensate him for a suggestion he made pursuant to the Employee Suggestion Program. However, for the reasons that follow, the court finds that Plaintiff's asserted jurisdictional grounds are unavailable and that his complaint fails to state a claim upon which relief can be granted, and therefore dismissal is appropriate.

I. Plaintiff has not properly invoked 28 U. S. C. Sect. 1339

Section 1339 of 28 U. S. C. grants federal district courts original jurisdiciton, concurrent with state courts, of civil actions arising under any act of Congress relating to postal matters. However, "(t)he mere fact that the United States Postal Service is a party does not mean that the action arises under an act of Congress relating to the Postal Service under Section 1339." Moore's Sect. 104-45 at 104-84. In the instant case, Plaintiff bases his cause of action on "violations of State of North Carolina contract law," citing to "theories of English common law, General Statutes of the State of North Carolina, North Carolina case law..... and the above mentioned federal statutes (referring to 28 W. S. C. Sect. 1339 and 39 U. S. C. Sections 401 and 409)." (Pl.'s Compl. Para. 14).

Plaintiff's claim does not arise under a congressional enactment, and therefore Section 1339 cannot be the basis for this court's jurisdiction. See Pike v. United States Postal Serv., 886 F. Supp. 487, 489 (E.D. Pa. 1995) (holding that Section 1339 does not provide jurisdiction over a lease dispute between property owner and Postal Service).

II. The Postal Reorganization Act pre-empts district court jurisdiction over claims that fall within the collective bargaining agreement

Section 409(a) of 39 U. S. C. grants federal district courts original, but not exclusive, jurisdiction over all actions brought by or against the Postal Service. However, even if Section 409(a) provides an independent basis for subject matter jurisdiction, this does not end the inquiry. 1 In the instant case, there is a statutory bar to Section 409(a)'s alleged

independent jurisdictional grant. Under Chapters 10 and 12 of the Postal Reorganization Act ("PRA"), 39 U. S. C. Sections 1001-11, 1201-09, Congress haa created a comprehensive and elaborate remedial scheme governing employment relations within the Postal Service. See American Postal Workers Union v. United States Postal Serv., 940 F. 2d 704, 708 (D. C. Cir. 1991). This labor relations framework allowed collective bargaining over wages, hours, and conditions of employment. 39 U. S. C. Sections 1201-1209, The statutory scheme "preempts federal court jurisdiction under other statutes of claims that fall within the collective bargaining agreement." 28 Wayne F. Foster and Joel E. Smith,

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1There is a split of authority concerning the reach of this statute. The seventh and ninth

Circuits have held that Section 409(a), standing alone, does not provide the presence of a substantive legal framework to afford subject matter jurisdiction," but rather requires the presence of a "substantive legal framework to afford subject matter jurisdiction." People's Gas, Light & Coke Co. v. United States Postal Serv., 768 F. 2d 1091, 1093 (9th Cir. 1985) The Third and Eighth Circuits, on the other hand, have held that "absent some other statutory bar, Section 409(a) grants district courts sumject matter jurisdiction over actions to which the Postal Service is a party." Licata v. United States Postal Serv., 33 F. 3rd 259; see Continental Cablevision v. United States Postal Serv, 945 F. 2d 1434 (8th Cir. 1991) .the disagreement is over whether Section 409(a) provides an independent basis for jurisdiction or merely removes the barriers of sovereign immunity. This court need not decide the issue. An interpretation consistent with the Seventh and Ninth Circuits renders Plaintiff's claim under Section 409(a) improper ab initio because there is no "substantive legal framework" present. Therefore, in the interests of finality, the court will

assume that the statute grants an independent basis for subject matter jurisdiction over actions to which the Postal Service is a party.

Federal Procedure (L. Ed. ed.) Postal Serviced, Sect. 63.308, at 120-21 (1996); see Pereira v. United States Postal Serv., 964 F. 2d 873, 875 (9th Cir. 1992) (noting that the collective bargaining agreement itself, and the concomitant ban on judicial review.....are themselves generated by statute....(and) are part of Congress's overall remedial scheme) . This preemption applies to claims arising out of employment disputes asserted under Section 409(a) as well as under the Federal Tort Claims Act ("FTCA") . See Kroll v. United States, 58 F. 3rd 1087, 1092-93 (6th Cir. 1995) (acknowledging the grants of jurisdiction provided by Section 409(a) and the FTCA, but finding that they do not confer jurisdiction over claims that fall within the collective bargaining agreement.

III. The Employee Suggestion Program falls within the collective bargaining agreement.

Plaintiff characterizes his claim as a "breach of contract in the administration of the (Employee Suggestion Program)...as contained in the Employee and Labor Relations Manuaal." (Pl's Compl. Para. 1). Although Plaintiff couches his claim in terms of "breach of an express or implied contract" (Pl.'s Compl. Para 8), this court finds that his claim is, instead, a labor relations dispute governed exclusively by the collective bargaining agreement. The collective bargaining agreement between the USPS and the American Postal Workers Union incorporates by reference all "handbooks, manuals and published regulations of the USPS that directly relate to wages, hours or working conditions." See Kroll v. United States, 832 F. Supp. 199, 201. (E.D. Mich. 1993). The term "working condi-

tions" has been defined to include such matters as training/apprentice programs, personnel, equipment, incentive plans, and improved facilities." Haynes v. United States, 20 Ct. Cl. 150, 155 (1990); compare National Fed'n of Fed. Employees, Local 541, 12 F. L. R. A. 270 (1983) (proposal to modify incentive awards program is within scope of bargaining between employer and local union as is directly concerns conditions of employment).

The Employee Suggestion Program, as outlined in the Employee and Labor Relations Manual, encourages employees to submit suggestions and sets out guidelines for awarding coompensation. 2 USPS ELM, Parts 633.11, 633.12, 633.4. As such, the Employee Suggestion Program directly relates to wages and working conditions, and therefore is governed exclusively by the collective bargaining agreement. See Kroll, 58 F. 3rd 1087,

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The stated goas and objectives of the Employee Suggestion Program are as follows: "To provide a method for the processing of employee ideas, (t)o provide for monetary savings and improved service through reduction in operating costs and increased efficiency. (t)o reward employees for adopted suggestions and provide for appropriate recognition, (t)o improve employee morale and enhance job satisfaction, (t)o improve communications between employees and management, creating a spirit of teamwork, (t)o provide an incentive for stimulating employee thinking, thereby encouraging self-expression, and (t)o improve safety practices and enhance working conditions." USPS ELM 631.2.

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Two courts have disagreed with this assessment and found, instead, that the Employee Suggestion Program constitutes a procurement of services" subject to the Contracts Dispute Act ("CDA"). See Hayknes v. United States Postal Serv. 1989 WL 160991, at *2 (D. Mass 1989) . These courts

1090-93 (6thCir. 1995) holding that employee's tort-based and contract-based claims were preempted because Employee Suggestion Program was governed by collective bargaining agreement) ; see also Licata v. United States Postal Serv., 1995 WL 138940, at *5 (D.N.J 1995) (holding that employee's tort-based and contract-based claims were preempted because Employee Suggestion Program was governed by collective bargaining agreement); see (D.N.J. 1995) (holding that management decisions involving compensation under Employee Suggestion Program are final and unreviewable).

In addition to his contract claim, Plaintiff appears to be asserting a tort-based claim for conversion of his stamp promotion idea without just compensation. Plaintiff alleges fraud, malice, willful misrepresentation, and interference with contract, resulting in "humiliation, mental distress, other incidents of hostile

workplace, and disparate treatment from that accorded other employees." (Pl.'s Compl. Paragraphs 10, 14. However, as with his contract-based claim, Plaintiff's sole recourse is to

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(continued)

concluded that the Employee Suggestion Program creates an implied contract claim under the CDA, and therefore the United States Court of Federal Claims has exclusive jurisdiction. To the contrary, the claims court has found that the CDA is inapplicable because the Employee Suggestion Program involves conditions of employment and does not constitute procurement of a good or service. See Hayne v. United States, 20 Ct.Cl. 150 (1990), aff'd, 928 F. 2d 411 (Fed. Cir. 1991); see also Cooley v. United States, 1997 WL 32546, at *5 (E.D. Pa. 1997) (agreeing with the reasonilng of hte claims court and noting that the voluntary submission

pursue this matter through the grievance procedures outlilned in the collective bargaining agreement.

4.

Because Plaintiff has failed to allege a legitimate basis for subject matter jurisdiction or successfully state a claim upon which relief can be granted, his claim must be dismissed.

An order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

/s/ "Frank W. Bullock, Jr."
United States District Judge

October 12, 1999

3
(...continued) of a suggestion is not tantamount to providing a service").

3

(...continued)

If the CDA applies to the Employee Suggestion Program, jurisdiction rests exclusively with the claims court; if the CDA is inapplicable, the Employee Suggestion Program is governed exclusively by the collective bargaining agreement. Either way, this court cannot hear the claim.

IDEA PROPOSAL : :
: 0285250 :

Employee Proposal Social Sec. No.

Key, Jr. John A. 237-70-4941

Position Title Employee Install.

AREA MAINTENANCE TECH F.M.O Greensboro, N. C. 27498

Employee Signature date

/s/ "John A. Key, Jr. " 12/8/96

Supervisor

TROY SMITH

Idea Proposal

PROMOTING FIRST DAY STAMP CANCELLATION, COLLECTION.
The Post Office uses poster, etc., to advertse and promote new stamps. Many people are so used to the posters that they vertually ignore them when they visit the Post Office. A new concept would be to have window clerks (men and women) wear neckties depicting the person or event that the new stamp is about or for. The ties should , of courst, compliment the uniform. Then,

as the window clerks are dealing with the customers, the customers will see the ties and ask "What is the tie all about?" The clerks can tell them about the first day cancellations and stamp collecting This would greatly enhance the sales of stamps and collectibles. There is a tie shop in the Four Seasons Mall called Ties, Etc.. This shop has ties of almost every popular person or event that we know of. They have times of Marilyn Monroe, Elvis Pressly, and James Dean, just to mention a few. If the Tie Shop didn't have a tie of the event, they could have one made. The Post Office would, of courts, have to buy the ties, but the return on their monies would far outweigh the cost. I have mentioned this to Enola Mixon, Postmaster, Greensboro, N. C., and she liked it.

SupervisorManagerEvaluator

11. Action taken by Evaluator

Idea Adopted X Idea not adopted

Wider Application Championed

12. Evaluation.

The reasons for not adopting this suggestion are:

1.Current regulations pertaining to dress codes for our window personnel preclude this type of item from being worn on the window.

2. The revenues generated from this proposal would not be sufficient to cover costs when compared to less costly forms of advertising.

3. There has been concerns raised from APWU in the past concerning the deviation from pre-established uniform guidelnes for window personnel.

4/10/97 /s? "Larry Bellow Retail Specialist "

Award Authorization

13. Authorization Official No. Account No.

51313

17. Award Authorized by: Category Code

18. Authorized Official Signature Title

16. Gross Amount

$

PS Form 1270

630 EMPLOYEE SUGGESTION PROGRAM

"In pertinent Part"

632.1 Aceptable suggestions

A suggestion is a constructive proposal submitted on Form 1269. Employee Suggestion, by an active postal employee. It defines a weakness in the present system and recommends a change resulting in benefits resulting in benefits to the Postal Service. A suggestion may involve a recommendation for change to:

a. Improve safety performance.

b. Improve service to the public.

c. Do a job better, faster, or cheaper.

d. Simplify or improve tools, methods, or procedures.

e. Conserve material, money, manpower, property, or energy.

f. Move the mail faster, easier, or more efficiently.

632,2 Unacceptable

A suggestion is not:

a. A submission which calls attento a problem but offers no specific solution.

b. An idea relating to matters in union contracts.

c. A recommendation for employee for off-the-job activities.

d. A proposal on service or benefits to employees, credit unions, repair and improvement of buildings and grounds, parking, or transportation, unless it relates to improved service to the public. to measurable savings, or to employee safety and health.

e. A reqest for routine repair or maintenace.

f. A proposal relating to a new stamp, such as stamp design; stamp denomination, or nomination of a person, place, or incident to be commemorated.

g. A proposal for the clarification of a regulation.

h. An idea or design for a poster, slogan, or advertising matter.

i. A proposal for change in postal rates and fees, or changes in classes of mail.

j. A correction of obvious errors or misprints in published directives, or the updating of items when changes in titles, organization designations, or addresses on forms and printed matter are made necessary by organizational change.

k. A recommendation for the minor modification of a printed form, such as the relocation of some element, the widening of a coumn, the addition of an entry, such

such as a telephone number, a change in precarboned or snap-out format, or the addition of a copy.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

00-1030

GERALD BANKS and KELLY BANKS,

Plaintiffs-Appellants,

v.

UNISYS CORPORATION AND BURROUGHS CORPORATION,

Defendants-Appellees.

DECIDED: September; 28, 2000

Before **MAYER**, Chief Judge, **FRIEDMAN**, Senior Circuit Judge, and **SCHALL**, Circuit Judge.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

00-1030

GERALD BANKS and KELLY BANKS,

Plaintiffs-Appellants,

v.

UNISYS CORPORATION AND BURROUGHS CORPORATION,

Defendants-Appellees

Vincent A. Wellman, Blaske & Blaske, P.L.C. of Ann Arbor, Michigan, argued for plaintiffs-appellants. On the brief was Thomas H. Blaske, Blaske & Blaske, P.L.C. Of counsel was Carol A. Elliot Seligson, Jordan, Deloof & Hopper, of Ann Arbor, Michigan

Judge Avern Cohn

Gerald Banks appeals the judgment of the United States District Court for the Eastern District of Michigan, holding on summary judgment that there was an implied-in-fact contract to assigne inventive rights from Banks to Unisys Corporation and Burroughs Corporation (together, "Unisys"). See Banks v. Unisys Corp., NO. 96-CV-70869(E.D.Mich.). June 3, 1999). Becuase the district court erred by concluding that Banks failed to raise a genuine issue as to any material fact, we vacate and remand.

Background

In late 1986, a headhunter recruited Banks, an expert in optical engineering, for employment with Burroughs Corporation, now wholly owned by Unisys Corporation, its successor in interest. When Banks began employment in 1987, Unisys

requested that he sign a standard form entitled "Agreement as to Patents, Inventions and Other Creative Property Rights and Regarding Competitive Activities", which was essentially an agreement to assign inventive rights to Unisys. Banks did not sign the agreement.

At Unisys, Banks began working with the image Camera Project, which was engaged in the development of an image camera for use with a high-speed document sorter. On his own initiative and on his own time, he tested the camera to confirm some problems he had detected, and recommended a redesign of the camera's optics. As a result of Banks efforts, the project developed an improved designe that produced an acceptable image in the camera. In 1988, Unisys incorporated the optics developed by Banks into a high-speed document sorter.

In 1989, Unisys intitiated six patent applications related to the sorter. Banks was listed as co-inventor on three of them without his consent or knowledge. Unisys asked him to sign the patent forms and represented that he would be paid for each one. However, Unisys did not explain the importance of the patents. Banks signed three separate declarations and patent assignments, but Unisys later told him he would be paid nothing.

Banks filed suit, claiming that Unisys made misrepresentations that induced him to assign his patent rights. Unisys moved for summary judgment, arguing that under the "employed to invent" rule, it owns all rights to the patents. Thus Banks' claims of fraud are meritless because he had no rights to assign. The district court examined evidence of Banks' relationship with Unisys at the time of the inventive work and determined

that the employment relationship was indistinguishable from that in Teets v. Chormalloy Gas Turbine Corp. 83 F. 3rd 403, 38 USPQ2d 1695(Fed. Cir. 1996) (1) See Banks, slip op. at 8. The district court granted Unisys' motion, concluding that Banks had not raised a genuine issue of material fact about whether there was an implied-in-fact contract to assign his inventive rights to Unisys. This appeal followed.

Discussion

The well pleaded complaint in this case alleged inter alia that Unisys failed to name Banks as a co-inventor on a number of other patents and requested that the district court correct them under 35 U.S.C. Sections 116 and 256. Therefore we have jurisdiction because the district court's jurisdiction waa based, in part, on 28 U. S. C. Section 1338, See U.S.C.

Section 1295(a)(1) (1994); MCV,Inc. v. King-Seeley Thermos Co, 870 F. 2d 1568, 1570, 10 USPQ2d1287, 1289(Fed. Cir. 1989). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Fed. R. Civ. P 56(c). In reviewing the district court's summary judgment, we view the

evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. See Anderson v. Liberty Lobby, Inc. 477 U. S. 242, 255(1986).

The general rule is that an individual owns the patent rights to the subject matter of which he is an inventor, even

though he conceived it or reduced it to practice in the course of his employ-. ment. There are two exceptions to this rule: first any employer owns an employee's invention if the employee is a party to an express contract to that effect; second where an employee is hired to invent something or solve a particular problem, the property of the invention related to this effort may belong to the employer. Both exceptions are firmly grounded in the principles of contract law that allow parties to freely structure their transactions and obtain the benefit of any bargains reached. See Teets, 83 F 3rd at 407, 38 USPQ2d at 1697, Melin v. United States, 261 U. S. 592, 597 (1923) When applying the "employed to invent" exception, "a court must examine the employment relationship at the time of the inventive work to determine if the parties entered an implied-in-fact contract to assign patent rights. Id.

(citing Erie R.R. v. Tompkins, 304 U. S. 64(1938)).

Unisys argues that under the "employed to invent" rule, the law requires no express agreement of assignment, and that ;an employee's refusal to assign his inventive rights to his employer has no legal significance. Because Banks was assigned to work on a special project with the sole purpose of developing a workable image camera system, including his specific assignment to create and develop design suggestions for the system, Unisys argues further that he cannot now claim a right to the invention when he has already been compensated for his work. Banks argues that his refusal to assign his patent rights precludes the conclusion that there was an implied-in-fact contract to transfer inventive rights between him and Unisys.

When it examined the employment relationship at the time of the inventive work, the district court noted the fact that Banks did not sign Unisys' standard form for the assignment of inventive rights, see Banks, slip op. at 2, but in its anlysis, the court failed to address the impact of Bank' failure to sign this agreement, as well as his failure to sign other agreements. See id at 8-10. There is evidence in the record that Unisys never revisited the issue of invention ownership during the remainder of Banks' employment. On the last day of his employment, Banks also refused to sign a "Restricted information Obligation" form that he believe would have assigned to Unisys all rights iln his ideas or ilnventions conceived during his employment. This evidence, at least when viewed in the light most favorable to Banks, creates a genuince issue of

material fact about whether there was a meeting of the minds necessary for an implied-in-fact contract. Although Unisys points to evidence that suggests that Banks was hired to invent an image camera system, a reasonable inferernce from Banks' failure to sign the agreements presented to him by Unisys, as well as from the failure of Unisys to pursue the signing of these agreements, is that Unisys acquiesced to Banks' refusal to convey ownership of his inventions, and thus an implied-in-fact-contract to assign inventive rights waa not formed. Summary judgment was inappropriate.

Conclusion

Accordingly, the judgment of the United States District Court for the Eastern District of Michigan is vacated, and the case is remanded for further proceedings consistent with this opinion.

COSTS

Appellants shall have their costs.

VACATED AND REMANDED

FOOTNOTES

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1. Before examining the employment relationship, the district court discussed the Michigan Supreme Court's application of the "employed to invent" rule in Gear Grinding Mach. Co. v. Stube, 282 Mich. 455 (1937), and determined that "Michigan law is identical to that stated by the Federal Circuit in Teets." Banks, slipl op. at 7.

Court for the Middle District of North Carolina, at Durham. Frank W. Bullock, Jr., District Judge. (CA-98-701-1)

Submitted: July 27, 2000
Decided: August 1, 2000

Before MURNAGHAN, WILKINS, and KING, Circuit Judges

Affirmed by unpublished per curiam opinion

Knox Kent Lively, III, Greensboro, North Carolina, for Appellant.
Walter C. Holton, United States Attorney, Lynn P. Klauer, Assistant United States Attorney, Greensboro, North Carolina; R. Andrew German, Lory J. Dym, UNITED STATES POSTAL SERVICE, Washington, D. C., for Appellee.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-2545

JOHN A. KEY, JR.,

Plaintiff-Appellant

versus

THE POSTMASTER OF THE UNITED STATES,
William J. Henderson,

Defendant-Appellee

Appeal from the United States District

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c)

PER CURIAM:

John A. Key, Jr. appeals from the district court's order dismissing his breach of contract action against the United States Postal Service. We have reviewed the record and the district court's opinion and find no reversible error. See Key v. Henderson, No. CA-98-704-1 (M.D.N.C. Oct. 13, 1999).* We dispense with oral argument because the facts and legal conclusions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

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* Although the district court's

order is marked as "filed" on October 12, 1999, the district court' records show that it was entered on the docket sheet on October 13, 1999. Pursuant to Rules 58 and 79(a) of the Federal Rules of Civil Procedure, it is the date that the order was physically entered on the docket sheets that we take as the efective date of the district court's decision. See Wilson v. Murray, 806 F. 2d 1232, 1234-35 (4th Cir. 1986)

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